UNITED
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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 779

Case No. 845: MAIA-SAMPAIO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Leonor Maia-Sampaio, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 28 February and 30 April 1995;

Whereas, on 20 March 1995, the Applicant filed an application requesting the Tribunal that:

> "(a) She be given financial compensation commensurate with the financial loss suffered by not being given proper consideration for the vacant P-5 post in the JIU [Joint Inspection Unit];
>
> (b) The post in the JIU be readvertised and the Appellant be permitted to re-apply for the position;
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> (c) The provisions of staff rule 112.3 be applied so that those who violated the United Nations Rules and Regulations be made liable for any financial consequences for the Organization resulting from such violation;
>
> (d) Such other and further relief as the Tribunal feels just and proper in the circumstances."

Whereas the Respondent filed his answer on 29 June 1995;

Whereas the Applicant filed written observations on 15 August 1995;

Whereas, on 3 July 1996, the Applicant filed additional documents with the Tribunal;

Whereas, on 8 July 1996, the Tribunal requested the Respondent to provide answers to certain questions, which he did, on 12 and 18 July 1996;

Whereas, on 23 July 1996, the Applicant submitted additional documents in response to the Respondent's submission of 18 July 1996;

Whereas, on 25 July 1996, the Respondent submitted additional documents in response to the Applicant's submission of 23 July 1996;

Whereas, on 30 July 1996, the Applicant submitted an additional document to the Tribunal;

Whereas, on 5 August 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 17 September 1996;

Whereas, on 5 August 1996, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 19 August and 12 September 1996, the Applicant submitted additional documents to the Tribunal;

Whereas, on 18 September 1996, the Respondent submitted an additional document in response to the Applicant's submissions of 12 September 1996;

Whereas, on 20 September 1996, the Respondent submitted a memorandum to the Tribunal in connection with the Applicant's memorandum of 19 August 1996;

Whereas, on 25 September 1996, the Applicant submitted an additional document in response to the Respondent's submission of 18 September 1996;

Whereas, on 9 October 1996, the Applicant submitted an additional document to the Tribunal in response to the Respondent's submission of 20 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 January 1970, as Associate Librarian in the Department of Conference Services, on a three-month fixed-term appointment at the P-2, step I level. Her appointment was successively extended for periods of eight months, two months, ten months and one year. On 1 July 1973, she was granted a probationary appointment, and on 1 April 1974, a permanent appointment. On this date, the Applicant was transferred to the Division of Human Rights in Geneva. On 1 April 1977, she was promoted to the P-3 level. On 17 May 1980, the Applicant was transferred back to Headquarters as Secretary, Advisory Board on Compensation Claims, in the Office of Financial Services. On 1 April 1983, she was promoted to the P-4 level. On 1 September 1987, the Applicant was reassigned to the Central Evaluation Unit, as Budget Officer. The Applicant was assigned to Geneva on 14 January 1989, as Programme Budget Officer in the Special Procedures Section of the Centre for Human Rights. She returned to Headquarters on 1 July 1990, as Evaluation Officer, Central Evaluation Unit, Department of Administration and Management.

On 16 March 1992, the Assistant Secretary-General for Human Resources Management (OHRM) listed in ST/IC/1992/21 all vacant professional posts to be filled in accordance with ST/AI/373 of 25 December 1991, on Placement and Promotion. These posts were vacant or likely to become vacant on or before 31 December 1992. Among them was the P-5 post of Senior Research Officer, Joint Inspection Unit (JIU), in Geneva.

In March 1992, in response to Vacancy Announcement VA 93-A-009-GE, the Applicant and 28 other staff members applied for this post. In a memorandum dated 20 August 1992, to the Director of

the Recruitment and Placement Division, OHRM, the Applicant reiterated her interest in the post.

The UNOG Departmental Panel set up to consider the candidates concluded that only two staff members, Ms. X and Mr. A, were fully qualified for the post.

The JIU considered the applicants for the post. In a memorandum dated 24 June 1992, the Executive Secretary informed the Chief Personnel Service, UNOG, that the JIU recommended Mr. A for the post. On 4 September 1992, the Director General, UNOG, transmitted this recommendation to the Assistant Secretary-General, OHRM.

On 2 November 1992, the Appointment and Promotion Board (APB) considered the candidates for the post. It noted that, as the candidate recommended by the JIU was to be transferred to another P-5 post, he was no longer interested in the JIU position. The APB requested the Acting Director of Personnel to contact the JIU regarding the selection by the JIU of the other candidate, Ms. X, who had been recommended by the UNOG Departmental Panel.

At the JIU's request, the post was re-advertised, in vacancy announcement 93-A-JIU-009-GE, with a deadline for applications of 17 May 1993.

In a memorandum dated 9 June 1993, to the Acting Director of Personnel, the Director, Division of Administration, after recounting the steps taken in connection with recruitment for the post, reported that "in late January or early February 1993 the Chairman of the JIU visited me at Headquarters and informed me that she had consulted the JIU and that it had been agreed to accept [Ms. X] if placed on the P-5 Register." In June 1993, an Information Circular was issued containing the 1992 Senior Officer (P-5) Promotion Register, which included the name of Ms. X, but not that of the Applicant.

On 14 July 1993, the Senior Recruitment and Placement Officer, Professional Staffing Service, OHRM, informed the Chief of

Recruitment, UNOG, that the vacancy announcement for the post had elicited 73 applications, 26 of which were internal. He listed 15 internal candidates, including Ms. X, as meeting all of the requirements of the post, and he listed 6 internal candidates, including the Applicant, as meeting "most of the requirements of the post". He requested the comments of the JIU in respect of the candidates.

In a memorandum dated 6 August 1993, entitled "Promotion of [Ms. X]: post No. UNB-3481-P-5-002, Senior Research Officer, JIU", the Director, OHRM, informed the Chief, Personnel Administration Section, UNOG, that, the Chairman of the JIU reported that the JIU had agreed to accept Ms. X if she was placed on the P-5 Promotion Register. He added that the APB had recommended her and her name had been placed on the Promotion Register. She noted that consequently, "the P-5 post cannot be considered as available for external circulation ... and OHRM has decided to withdraw the vacancy announcement so that the post can be used to accommodate [Ms. X]'s transfer and promotion." She requested that action be initiated to effect the transfer and promotion and that the JIU be informed accordingly.

In a letter dated 26 August 1993, the Chairperson of the JIU informed the Director, OHRM, that she never said either that she had consulted the JIU or "that it had been agreed to accept [Ms. X] if placed on the P-5 Promotion Register." She noted that the Inspectors had studied her memorandum of 6 August 1993 to the Chief of Personnel Administration Section, UNOG, cited above, and had concluded that it was not in conformity with either the JIU Statute or the established practice of the Unit, whereby the Inspectors "independently select and recommend, for appointment by the Secretary-General, the staff they judge most qualified ..." In the case of Ms. X, she noted that, during the 1992 promotion exercise, her candidature had been evaluated, and the evaluation had revealed that she "does not possess all the JIU requirements for optimal performance against the P-5 post which requires, among others, full

mastery of the French language." Finally, she referred to the list of candidates that had been forwarded to the JIU in July and informed the Director that the Inspectors had decided to support another candidate.

In a letter to the Director, OHRM, dated 21 October 1993, the Applicant noted that more than two years had passed since she had applied for the JIU post and that she "was not given proper consideration for the post due to the fact that OHRM was pushing another candidate." She requested the Director to investigate the situation and to prevent the post from being filled by an unsuitable candidate. On 2 November 1993, the Applicant again wrote to the Director, OHRM.

In a memorandum dated 8 November 1993, to the Chairperson of the JIU, the Director of OHRM "confirmed [their] agreement" concerning the filling of a number of vacancies in the JIU Secretariat. As regards the post in dispute, the memorandum recites that: "Ms. [X]'s promotion is to be implemented against the P-5 post (...)."

On 5 November 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB) requesting suspension of action on filling the JIU post. The JAB adopted its report on 18 November 1993, recommending that "all action regarding the above mentioned promotion to the P-5 post in the Joint Inspection Unit be suspended pending the completion of the appeal." On 29 November 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General "has determined that procedurally your request was not properly before the Board as you had not met the requirements of staff rule 111.2(a), [i.e.] the submission of a request to the Secretary-General for administrative review." He further stated "even if your suspension request were properly before the Board, the decision contested has been implemented and therefore the requirement of staff rule 111.2(c)(ii) has not been met."

On 9 December 1993, the Applicant requested the Secretary-General to review the decision not to include her name in the P-5 Promotion Register. On 15 December 1993, she requested the Under-Secretary-General for Administration and Management to review the decision to reject the JAB recommendation for suspension of action. On 6 January 1994, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 4 August 1994. Its considerations, findings and recommendation read in part as follows:

> "... The Panel ... concluded that the established procedure applicable to placement/promotion had been followed in the case of the Appellant.
>
> 50. However, the Panel observed that a number of irregularities were made and a certain confusion existed in the procedure leading to the contested decision. In that regard, however, it noted that in its Judgement No. 116, Josephy, the Administrative Tribunal had considered that although procedural irregularities were to be regretted, it was 'of the opinion that they are not such as to affect the validity of the decision ... which, as stated above, otherwise complied with the conditions of substance set forth in the Staff Regulations and Rules'. The Panel was of the view that even in the absence of those irregularities and confusion, nothing proves that the Appellant would have been promoted and assigned to the post in the JIU, especially in view of the fact that she was not mentioned by the JIU as a fully qualified candidate for the post.
>
> 51. The Panel then considered the question of due process and prejudice. It noted that the Appellant had produced no direct evidence that prejudice or other extraneous factors had played any role in reaching the contested decision. It was therefore of the opinion that in spite of the irregularities and confusion mentioned in paragraph 50 above, the contested decision did not violate the requirement of due process.
>
> Findings and recommendation
>
> 52. The Panel unanimously:

(a) Finds that proper procedure was followed in the advertisement of the vacancy in the JIU;

(b) Finds that the Appellant was properly considered for the post in JIU regarding the Appellant, in spite of irregularities and confusion, as these irregularities and confusion were not such as to justify the invalidation of the contested decision;

(c) Finds that the contested decision was not tainted by prejudice or some other extraneous factors.

53. The Panel unanimously recommends that the appeal be rejected."

On 10 August 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and has taken note of its findings that the proper procedure was followed in the advertisement of the vacancy in the Inspection Unit, that in spite of irregularities and confusion, you were properly considered for this post, and that the contested decision was not tainted by prejudice or some other extraneous factors. He has also taken note of the Board's recommendation that your appeal be rejected. The Secretary-General has accordingly decided to take no action in respect of your appeal."

On 20 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given fair consideration for a post to which she was entitled under the Staff Rules and Regulations and for which she was eminently qualified.

2. The Director, OHRM, unfairly and improperly engineered another staff member's career development to the detriment of other staff members, particularly the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-selection to the post in question.

2. The decision not to select the Applicant for the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 5 to 26 July 1996 in Geneva and from 25 October to 21 November 1996 in New York, now pronounces the following judgement:

I. From the information before it, the Tribunal understands that the usual practice for appointment of staff to serve with the Joint Inspection Unit (JIU) is as follows: the Office of Human Resources Management (OHRM) transmits to the JIU a list of applications, following the relevant vacancy announcement.

The JIU reviews these applications and makes its recommendations. The UNOG Departmental Panel again reviews the candidates and informs the JIU of its choice. In the light thereof, the JIU ratifies or modifies its initial recommendation.

The next step in the selection process is the review by the Appointment and Promotion Board (APB), followed by the appointment of the successful candidate.

It is the Tribunal's task to determine, in the first place, whether the regular procedure was followed in this case and whether the Applicant's right to be fully and fairly considered was respected. The vacancy announcement drew 29 applicants. According to the established practice, their names should have been communicated to the JIU. There is no record that this actually took place. Nevertheless, whether or not it was in possession of the list of all the candidates, the JIU recommended Mr. A. for the post.

The chronology of events submitted to the Tribunal shows that on 9 June 1992 "UNOG Departmental Panel meets to consider the recommendation submitted by the JIU Secretary for the selection of [Mr. A]." In the minutes of this meeting, it is stated that "the Panel carefully considered the qualifications and experience of all the candidates on the basis of the criteria listed in paragraph 22 of ST/AI/378 and in the light of the particular requirements contained in the job description."

The UNOG Departmental Panel considered the candidates for the post. It concluded that two candidates, Mr. A and Ms. X, were fully qualified for the post.

While not fully satisfied with any of the candidates, the JIU expressed its preference for Mr. A.

The UNOG Departmental Panel suggested that the JIU give further consideration to Ms. X in the light of her qualifications and experience and in view of ST/SGB/252 of 20 October 1992 (now superseded by ST/SGB/282 of 5 January 1996) on the Improvement of the Status of Women in the UN Secretariat.

However, the JIU maintained its recommendation of Mr. A. This recommendation was approved by Headquarters and submitted to the APB. When the APB was considering the recommendation, it was informed that Mr. A was being transferred to another post. The APB then recommended Ms. X. The JIU did not accept this recommendation and asked that the post be re-advertised.

II. A new selection process for the post was instituted. The vacancy was announced, pursuant to Vacancy Announcement 93-A-JIU-009-GE. Seventy-three candidates applied, including the Applicant. She alleges that she was not considered properly for the post, because OHRM was actively favouring Ms. X's candidacy.

The Applicant bases this charge on information given by the Director of OHRM to the APB, that the Chairperson of the JIU had said that she had consulted members of the JIU and that it had been

agreed to accept Ms. X without resorting to a new selection process. In a communication dated 26 August 1993, to the new Director, OHRM, cited below, the Chairperson of the JIU denied that she had said this to the Director, OHRM. An affidavit of the former Secretary of the JAB is of assistance in this matter. It states that she had known the Chairperson of the JIU for a long time, and had been contacted by her for advice on the correct procedures for staffing the JIU Secretariat.

The Chairperson of the JIU told the former Secretary of the JAB that the Director, OHRM, had informed her that Ms. X had been recommended by the APB to fill the JIU post and that the matter was no longer in the hands of OHRM or the JIU. She further indicated to the former Secretary of the JAB that, when she pressed OHRM to take action on the P-5 post and other pending matters, she was given to understand that no personnel actions would be effected so long as the JIU resisted taking Ms. X for the P-5 post.

III. For this reason, the Applicant contends that she was not given fair consideration for a post for which she was qualified and for which she applied. Her right to consideration was violated. She claims that the possibility of her promotion to the P-5 level was being obstructed by the actions of the Director, OHRM, in order to favour another candidate. The Applicant claims that proper procedures were not followed, and that the Director, OHRM, misled the APB by informing it that the JIU post was available for the promotion of Ms. X.

IV. The Respondent argues that the staff shall be appointed by the Secretary-General under regulations established by the General Assembly; that appointments and promotions are within the discretion of the Secretary-General and that the Tribunal cannot enter into the merits of these issues.

The Respondent further argues that the Applicant was given full and fair consideration for the post. He refers to the substantial difference between the Director, OHRM's account of events and that described in the former Secretary of the JAB's affidavit. He maintains that it is not possible to determine with certainty who said what to whom. The Respondent also contends that, in any event, any difference in perception, as the Respondent describes it, did not affect the consideration given to the Applicant for the post, because the JIU's choice for the post was somebody entirely different, and not the Applicant.

V. The Tribunal notes that the second vacancy announcement concerning the P-5 post was withdrawn by OHRM so that Ms. X's transfer and promotion could be implemented. This step must be examined to see whether it was taken on the basis of inaccurate and misleading information, resulting in the disregard of the Applicant's rights. Therefore, the conflicting accounts of the Chairperson, JIU, and the Director, OHRM, must be examined.

VI. The Tribunal accepts the contents of the affidavit by the former Secretary of the JAB, as representing the reality of the situation. The Tribunal finds that the Chairperson, JIU, did not agree to the selection of Ms. X for the vacant post. This is confirmed in her statement, dated 26 August 1993, to the successor to the Director of OHRM:

> "May I also clarify that I never said to [the Director, OHRM] that I had 'consulted the JIU and that it had been agreed to accept [Ms. X] if placed on the P-5 Promotion Register'.
>
> At their meeting of 24 August 1993 the Inspectors, having carefully studied the substance of your above-mentioned memorandum, concluded that it was neither in conformity with article 19, paragraph 2, of the JIU Statute which provides that the Unit's staff will be appointed by the

> Secretary-General after consultation with the Unit, nor consistent with the practice established since the inception of the Unit, whereby the Inspectors, following receipt of candidatures from the UN Administration, independently select and recommend, for appointment by the Secretary-General, the staff they judge most qualified to assist them in the discharge of their highly complex inter-agency responsibilities.
>
> Neither procedure was followed in the case of [Ms. X]. ..."

VII. The Chairperson of the JIU's denial that she told the Director, OHRM, that she had consulted other members of the JIU is not made in isolation. It is made in the context of allegations of other difficulties. According to the affidavit from the former Secretary of the JAB, she says that the Director, OHRM, told the Chairperson, JIU, that the appointment was out of their hands. She speaks of not receiving applications for the post, and she says that she was subjected to pressure to accept Ms. X.

The statement by the successor to the Director, OHRM, as reported by the former Secretary of the JAB in her affidavit, that the matter had been handled wrongly by her predecessor for reasons that she could not fathom, must also be taken into account.

VIII. While the Secretary-General's discretion in matters of promotion and appointment is unquestioned, and while the Tribunal does not seek to substitute its own judgement for his, the situation disclosed here raises the question of whether proper procedures were followed, of whether extraneous matters were brought to bear on the selection process, and of whether the decision was made on the basis of inaccurate information.

IX. It cannot be said that the Applicant would have obtained the post even if the procedures relating to the selection for the post after the issuing of the second vacancy announcement, had not been

defective. Nonetheless, the Applicant has established, to the satisfaction of the Tribunal, that the procedures were flawed due to the highly improper interference in the process by the Director, OHRM, with the objective of promoting the appointment of Ms. X, to the detriment of all other candidates and the selection process as a whole. This impropriety violated the Applicant's right to full and fair consideration for the post.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant $5,000.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary